Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

HOWLAND C. LUTZ,

Petitioner,

vs.

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH G. RUSH
Counsel of Record
LAGOS, LAGOS & RUSH
Attorneys for Petitioner
One South Limestone Street
Suite 1000
Springfield, Ohio 45502
(513) 323-5555

6332
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Does a plaintiff advancing a claim under the Age Discrimination in Employment Act in a reduction in force discharge demonstrate sufficient basis for recovery, for purposes of summary judgment sought by the employer, by showing age was a factor in the employer's decision to discharge him — even if age may not have been the only factor — and showing that he was replaced by a younger employee?

2. May a party seeking summary judgment submit a later affidavit in an attempt to preclude a material issue of fact from consideration by the Court?

3. Is there a conflict among the Circuit Courts of Appeal warranting review and resolution by this Court, regarding the extent of the showing required of age as a factor in the discharge of an employee, for purposes of a claim under the Age Discrimination in Employment Act?

LIST OF PARTIES

In accordance with Rule 14.1(b) of this Court, Petitioner states that the names of all parties to the proceedings in this matter before the United States District Court for the Western District of Ohio and before the United States Court of Appeals for the Sixth Circuit appear in the caption of this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Howland Lutz, Petitioner, by his attorney, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Review of this matter by this Court is warranted so that this Court may resolve standards to be applied in deciding an employer's summary judgment motion in a claim under the Age Discrimination in Employment Act, and the extent to which a plaintiff proceeding for recovery under the Act must show that age was a factor in his discharge so as to maintain his action.

Review by this Court is also warranted to re-emphasize the impropriety of submission of a supplemental affidavit by one seeking summary judgment in an attempt to preclude a material issue of fact.

OPINIONS BELOW

On December 12, 1994, the United States Court of Appeals for the Sixth Circuit issued a short, one-page decision affirming summary judgment granted to the Respondent employer Navistar International Transportation Corporation, in a claim under the Age Discrimination in Employment Act by Petitioner Howland C. Lutz in the United States District Court for the Southern District of Ohio. (No. 93-4205 (unreported), *see* Appendix A).

On December 31, 1992, the United States District Court (Rice, J.) granted the motion for summary judgment submitted by the employer. On that date, judgment was entered in favor of the Respondent employer terminating Petitioner's ADEA action. (No. C-3-88-513, *see* Appendix C).

On September 30, 1993, the District Court (Rice, J.) denied Petitioner's post-judgment motion to vacate, reopen, reargue, or alter or amend the December 31, 1992 judgment. (*See* Appendix B).

On October 28, 1993, Petitioner submitted his appeal to the United States Court of Appeals for the Sixth Circuit. (*See* Appendix E and Appendix F).

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was issued on December 12, 1994. The Sixth Circuit affirmed the District Court's grant of summary judgment to the Respondent employer. Petitioner filed no motion for rehearing or

reconsideration in the Sixth Circuit following this decision.

In accordance with Rule 13.3 of this Court, this Petition is timely filed within 90 days of the December 12, 1994 decision by the United States Court of Appeals for the Sixth Circuit.

The jurisdiction of this Court is invoked through 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act provides, in pertinent part (29 U.S.C. § 623(a)(1)):

> (a) it shall be unlawful for an employer —
>
> > (1) to fail or refuse to hire or (to) discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age.

STATEMENT OF THE CASE

A. Initial Background

Howland C. Lutz ("Mr. Lutz," "Plaintiff," "Appellant," or "Petitioner") is an Ohio resident and a long time employee of Navistar International Corporation ("Navistar," "Defendant," "Appellee," or "Respondent"). Navistar produces commercial vehicles, including trucks. Mr. Lutz began working for Navistar on approximately July 1, 1957. (*See* Complaint at App. 15a).

Mr. Lutz came to the company with a B.S. degree from the University of Maryland (College Park). He began as a management trainee. For the next 29 years, his sole employment was with Navistar at its Springfield, Ohio plants. He eventually reached managerial positions in sheet metal fabrication and other assembly processes (Department 65).

During this period, Mr. Lutz received at least 11 general raises, 5 promotional raises, and at least 15 merit raises. His work evaluations earned him an "A" employee rating. Indeed, Mr. Lutz's last merit raise was on August 11, 1986, about a month before his termination. (*See* facts developed before the District Court and Statement of Facts in Appellants' Brief before United States Court of Appeals for the Sixth Circuit).

On October 13, 1986, Mr. Lutz, along with several other selected employees of Navistar, was called to a meeting with Plant Manager Jim Simonton after work. They were summarily informed at that meeting that they were being discharged, effective October 24, 1986. Mr. Simonton read to the summoned employees from a prepared outline regarding the discharges. Each employee also was given a handout explaining separation benefits. (*See* Memorandum in Support of Defendant Navistar's Motion for Summary Judgment, at 4).

Mr. Lutz was at that time 54 years old. The ostensible reason given by Navistar for this discharge was a cost reduction campaign undertaken by Navistar, which supposedly necessitated the discharge of a number of managerial employees.[1]

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1. Navistar contends that the reduction-in-force efforts, required by it for economic reasons, involved the discharge of 72 of its 482 managers. Navistar stated these discharges were due to "lower than expected net income, reduced shipments of product, a decline in the price realization for both new and used

(Cont'd)

There was no prior written notice by Navistar to Mr. Lutz regarding his discharge. Mr. Lutz was not asked to take a pay cut in order to stay employed. (Memorandum in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment, at 3, and Exhibit of Defendant's Response to Plaintiff's Request for Admissions of Fact, at "m," p. 4.)

However, in a deposition later to be given by a Navistar manager responsible for the discharge decisions, Mr. Thomas E. Hennigan, Navistar *acknowledged* that age was a factor in the decision to terminate Mr. Lutz. (Hennigan Deposition, p. 22). He stated (emphasis supplied):

> Q. Let's go back to the plan for separation. What were the factors involved?
>
> A. I don't understand the question.
>
> Q. All right. When you determined to — when you discharge somebody, what factors did you consider; do you remember?
>
> A. When — as far as guidance to the managers who were making the decisions, the individuals were counseled to give consideration to EEO, *age*, company service, performance, flexibility, education, training, background, experience.

Thus, it is beyond question, by this admission alone, that age was a factor in Mr. Lutz's discharge from Navistar.

(Cont'd)
trucks during 1986 and a forecast of a declining market for Navistar's products in 1987." (*See* Memorandum in Support of Navistar's Motion for Summary Judgment, at 2-3).

The day after Petitioner's discharge, on October 14, 1986, Navistar placed a Marshall D. Leigh in Mr. Lutz's position. Mr. Leigh is 14 years younger than Mr. Lutz.

In addition, Navistar continued to hire or transfer supervisory foremen into Mr. Lutz's department. There were 23 foremen at the time Mr. Lutz was fired, 25 foremen the following year, and 33 foremen after that. Virtually all of these hires or transfers were younger than Mr. Lutz. (Rec. 25, Exhibit E).

B. Complaint, Summary Judgment Sought by Navistar

On November 2, 1988, Mr. Lutz filed a Complaint against Navistar in the United States District Court for the Southern District of Ohio (Western Division). (App. 14a-17a) . He sought relief under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 *et seq.*, 29 U.S.C. § 215 *et seq.* ("ADEA")). The Complaint also demanded a jury trial. (App. 17a).

The Complaint recited that the discharge of Mr. Lutz by Navistar violated the ADEA in that he was discharged (on October 13, 1986), replaced with a younger employee doing the same work and who was paid a salary lower than that paid to Mr. Lutz, and Navistar's reason of "economic necessity" for his discharge was pretexual. (App. 15a) .

The Complaint sought: reinstatement of Mr. Lutz to his former position or to a position similar in responsibilities and salary, fringe benefits, a permanent injunction against Navistar for any further ADEA violations against him, back pay, and prejudgment interest. The Complaint also sought front pay, fringe benefits, and other compensation until Mr. Lutz attains the age of 62 if Navistar could not reinstate him. (App. 16a, A-C) .

The Complaint was answered by Navistar on November 1,

1988. Discovery matters preceded depositions of Mr. Lutz and of certain Navistar representatives, including Thomas E. Hennigan. Many of these depositions were taken between February 1989 and February 1990.

On February 20, 1990, Respondent Navistar submitted a motion for summary judgment as to claims in the Complaint. Navistar stated Mr. Lutz was terminated due to a reduction in force caused by economic reasons. Navistar contended that due to the reduction in force and the fact that "truck assembly schedules were expected and did, in fact, remain at the same level immediately after the management separations as before" thus requiring to maintain the same production level with fewer managers, it was thus necessary "to retain the strongest, best performing managers." (Memorandum in Support of Motion for Summary Judgment, at 3). It claimed that there "is simply no evidence of age discrimination." (Memorandum in Support of Motion for Summary Judgment, at 9).

Navistar further claimed in its motion that several criteria were utilized in determining which managers to retain, including "performance, breadth of experience, flexibility, company service, length of time in management, education/training, ability to do available work, knowledge of unit function, and areas to be reduced." (Memorandum in Support of Motion for Summary Judgment, at 3-4, citing supporting affidavit of Thomas E. Hennigan, at ¶ 8).

Navistar stated this criteria were not considered in any particular order of importance and that Navistar did not apply a "rigid formula" to determine who would be discharged. Instead, Navistar claimed that it "attempted to evaluate all the factors in order to make the painful and difficult decisions about whom to separate and whom to keep." (Memorandum in Support of Motion for Summary Judgment, at 4).

As to Mr. Lutz, his performance, while not "poor enough" to warrant discharge on that ground alone[2], "placed him among the least valued in his department (Department 65) in light of the need to retain managers who could continue previous production and operation levels." (Memorandum in Support of Motion for Summary Judgment, at 4, citing supporting affidavit of Hennigan at ¶¶ 8 and 9 and Ex. B as to Mr. Lutz's performance).

In its motion, Respondent Navistar thus commented:

> In order to meet the economic goals set by Navistar corporate headquarters, the Springfield plants had only a short time to make the difficult separation decisions. This time was further shortened as some employees were eligible for early retirement and Navistar needed to provide time for these employees to decide if they wanted to take advantage of a retirement enhancement by retiring early. Each person who retired early reduced the number of employees who needed to be involuntarily separated. Consequently, no clear picture emerged until the time of the actual separations of how departments would be restructured to handle the unchanged workload with fewer managers.

(Memorandum in Support of Motion for Summary Judgment, at 5, citing Hennigan affidavit in support at ¶ 12). Thus, Respondent contended that Mr. Leigh was only "temporarily" transferred to Mr. Lutz's position after Mr. Lutz was discharged. And Navistar stated:

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2. And *see* Memorandum in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment, at 3, noting Defendant's Response to Plaintiff's Request for Admissions of Fact, at "q," p. 5.

> Navistar's plant-wide involuntary separations did not adversely impact upon managers in the protected age class. In fact, the percentage of managers in the protected class actually increased due to the reduction-in-force. Before the involuntary separations, 75.7% of the Navistar managers were in the protected age class. After the separations, 76.1% of the Navistar managers were in the protected class.

(Memorandum in Support of Motion for Summary Judgment, at 6, citing Hennigan affidavit in support, at ¶ 14).

Respondent therefore contended Mr. Lutz's age discrimination claim was no more than "a belief," adding that Mr. Lutz stated in his deposition that while at Navistar, he was not told by anyone he was too old to do his job. (Memorandum in Support of Motion for Summary Judgment, at 6-8, citing Lutz deposition at pp. 45-47). (But Petitioner had also stated in that deposition that he had excellent job attendance and job loyalty, and that economic reasons were told to him as the basis for his discharge).

Thus, Respondent contended Petitioner had not presented a prima facie case of age discrimination. Respondent remarked, "The ADEA was manifestly not designed to give discharged older workers an automatic cause of action when their age was not a determinative factor in their discharge." (Memorandum in Support of Motion for Summary Judgment, at 10).

In his answer to the motion submitted March 19, 1990, Mr. Lutz stated that, at the outset, the issues raised by Navistar were disputes of material fact which could not be resolved by summary judgment. On the issues, he also stated that, to the contrary, there

is "substantial evidence of age discrimination by Navistar against the plaintiff." (Memorandum in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment, at 3).

Petitioner pointed to his continued and longstanding employment with Respondent, his numerous merit raises, and his performance evaluations, all of which challenge Respondent's contention that Petitioner was discharged due to performance problems. (Memorandum in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment, at 8-9). He also contended that the various depositions of Navistar representatives clearly established not only that Mr. Lutz was discharged but also that he was replaced, and not just temporarily, by a younger employee.

In addition, Petitioner contended that in the Sixth Circuit "age need not be the sole determining factor" in a discharge but if age is a determining factor then the ADEA has been violated. (Memorandum in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment, at 11). He stated that the circumstances as described and alleged support his claim and, at the least, present issues of material fact precluding summary judgment for the employer.

Navistar submitted a reply to Mr. Lutz's response, on April 9, 1990. Navistar reiterated the grounds for its summary judgment motion, stating again that Petitioner's ADEA claim is based only on his "subjective belief" that he was discharged due to his age. Navistar also contended the fact that a plaintiff can demonstrate competence in his former position or that he was replaced by a younger employer are by themselves insufficient to establish a prima facie case of age discrimination as to the discharge.

In further support of this reply, Respondent Navistar submitted another affidavit from Mr. Hennigan. This affidavit

purported to "clarify" statements made by him in his deposition regarding age as a factor in the decision to discharge Mr. Lutz. Thus, Navistar, by this additional affidavit, attempted to foreclose an issue of material fact as to age as a factor in the discharge.

C. Summary Judgment Granted, Sixth Circuit Affirms

On December 31, 1992, the District Court (Rice, J.), acting without a hearing, granted Navistar's summary judgment motion. (App. 7a-13a). *Relying in part on the second affidavit by Hennigan* submitted with Navistar's reply, the court concluded that the statement in Hennigan's deposition as to age being a factor in the termination was "ambiguous" and was "later explained." (App. 8a).

The District Court ruled that the evidence so far presented by Petitioner was not enough to withstand a motion for judgment at trial at the conclusion of Petitioner's case, and likewise is not enough to withstanding a motion for summary judgment. (App. 8a). The court reviewed Navistar's contentions regarding Mr. Lutz's discharge and quoted at length from the second affidavit of Mr. Hennigan as to the statements made in his deposition. (App. 9a).

The District Court also concluded Mr. Lutz did not present the required "additional direct, circumstantial or statistical evidence that age was a determining factor in his termination." (App. 10a, quoting from other authority). The court ruled Mr. Lutz's claim was based on "conclusory allegations, based upon his subjective belief, that he was discharged because of his age . . . ." (App. 10a-11a). This was found to not be sufficient for a prima facie case, given that the employer articulated a legitimate, non-discriminatory reason for discharge.

Thus, the District Court stated, after reviewing summary judgment standards (*see* App. 11a-12a):

> In this case, this Court concludes that it is neither a reasonable inference nor a remote possibility that any reasonable/rational trier of fact could conclude that Hennigan's deposition meant, as Plaintiff would have this Court believe, that he directed his managers, in deciding the issue of who would be terminated due to the reduction in force, to make certain that age was a determining factor. Such a conclusion would be both unreasonable and irrational, to the extent that same could not sustain a jury verdict.

The court continued:

> It would be a particularly unreasonable and irrational conclusion to interpret Hennigan's deposition statement, in the manner Plaintiff requests, when, in the very same sentence, Hennigan has stated that he directed his managers to also take into consideration, not only factors such as would be relevant to a reduction in force, factors pertaining to the relative abilities of the employees involved, but also EEO considerations. Interpreting this sentence, as Plaintiff would have this Court do, would have Hennigan telling his managers to be very cognizant of EEO considerations, but to fire the old people anyway. Such an interpretation would be not only unreasonable and irrational, but ridiculous as well.

Judgment thus was entered for Navistar on December 31, 1992.

On January 19, 1993, Petitioner Lutz submitted a post-judgment motion to vacate, reopen, reargue, and reconsider the judgment, and to alter and amend the judgment. Petitioner contended that it was improper for Respondent to submit, in its reply to Petitioner's response to Respondent's summary judgment motion, the supplemental affidavit by Hennigan attempting to clarify key statements made in his deposition and that it was improper for the District Court to rely upon it. On February 3, 1993, Respondent Navistar replied to the post-judgment motion, with a memorandum.

On September 30, 1993, the District Court (Rice, J.) denied the post-judgment motion, and entered judgment. (App. 3a-4a). The court stated Mr. Hennigan's supplemental affidavit "does not contradict his deposition testimony; rather, it explains or amplifies upon the answers he gave during his deposition." The court stated it is "permissible for a witness to supply an affidavit which clarifies such testimony."

Mr. Lutz filed an appeal to the United States Court of Appeals for the Sixth Circuit, on October 28, 1993. (App. 18a-21a).

On December 12, 1994 the Court of Appeals affirmed the District Court in its grant of summary judgment to Navistar. In a brief, one-page, unpublished, per curiam Opinion, the Court of Appeals simply stated there was no error in the District Court's reasoning. There was no further discussion of the issues.

REASONS FOR GRANTING WRIT

I.

THE SIXTH CIRCUIT COURT OF APPEALS MISAPPLIED THE STANDARD FOR DEMONSTRATING A CLAIM UNDER THE ADEA FOR PURPOSES OF WITHSTANDING A MOTION FOR SUMMARY JUDGMENT BY RESPONDENT EMPLOYER.

It seems that the Age Discrimination in Employment Act is becoming the poor step-child of federal employment discrimination law. This case is a prime example of the courts accepting without question an employer's "economic" reasons for discharging an older employee. This acceptance went so far as allowing the employer, in the ADEA litigation, to submit a supplemental affidavit by its representative to "clarify" a deposition statement made by that representative by which the employer admitted age was a factor in the discharge decision — thus circumventing a crucial and material issue of fact which should have precluded summary judgment. A clearly age-related discharge thus goes unaddressed.

If this situation continues, the ADEA could be rendered moot. Certainly no employer aware of the ADEA, and no employer as sophisticated as Navistar, will declare that age was a *determining* factor in a discharge decision. And an employer with the sophistication of Navistar will not leave readily-discernible clues in that regard in an employment or discharge record. Therefore, an ADEA claim often must be established on a less-than-explicit employment record and often must be shown through reasonable conclusions drawn from facts developed in the ADEA litigation.

Discharge is "the industrial equivalent of capital punishment." *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981) (Powell, J., concurring at 421 U.S. 421). A discharge which invokes ADEA remedies must be taken seriously by courts charged with effectuating congressional intent in that statute.

Congress enacted the ADEA to respond to the problems of older workers in the job market, including the obstacles encountered by long-term employees who are suddenly discharged. *See generally* Report of the Secretary of Labor to Congress, *The Older American Worker: Age Discrimination in Employment* 11-17 (1965) reprinted in *EEOC, Legislative History of the Age Discrimination in Employment Act*, 16, 28-34 (1981).

The ADEA consistently has been interpreted by administrative agencies charged with its enforcement and by the courts to prohibit an employer from replacing higher paid employees with lower paid employees in order to save money. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), at 828 F.2d at 1205, noting 29 C.F.R. 1625.7(f) (1986) and 29 C.F.R. 860.103(h) (1979). And courts have also "emphatically rejected" business practices in which the plain intent and effect of the action was to eliminate older workers who had built up, through years of services, higher salaries than their younger counterparts. *Metz*, 828 F.2d at 1206, and *see* cases and authorities cited, including *EEOC v. Chrysler Corp.*, 733 F.2d 1183 (6th Cir. 1984) and *Dace v. ACF Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983), *aff'd on rehearing*, 728 F.2d 976 (1984).

Cost-cutting is not a legitimate, non-discriminatory reason for discharging an older employee while retaining younger, lower-paid employees. Even if economic savings are involved, where these issues are directly related to an employee's age, it is an ADEA violation to discharge an employee for those reasons.

Thus, even if economic factors are indicated, if those factors nevertheless are related to age in a determination to discharge the employee, the ADEA is implicated. *See Marshall v. Arlene Knitwear, Inc.*, 454 F. Supp. 715 (E.D.N.Y. 1978), *aff'd/rev'd without opinion*, 608 F.2d 1369 (2nd Cir. 1979).

In this context, Petitioner notes that for more than 20 years the nature of the proof required to recover in a suit over alleged discriminatory employment action has the discussion by this Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Reviewing the standard and elements of proof in a Title VII action,[3] this Court described the showing required to establish a prima facie case of discrimination. This involves the now well-known four factors: (1) the plaintiff belongs to a racial minority (or a protected group), (2) the plaintiff was qualified for a job for which the employer was seeking applicants (or for the job which the plaintiff held), that despite these qualifications, (3) the plaintiff was not hired (or was terminated), and (4) after the rejection (or dismissal) the position remained open and the employer continued to seek applicants (or the plaintiff was replaced by a younger employee).

As *McDonnell Douglas* noted, once a prima facie case is made, the burden then shifts to the employer to "articulate some legitimate non-discriminatory reason for" the employment action. The plaintiff then has an opportunity to show that the employer's stated reasons for the employment action are a "pretext."

If this pretext showing is made, the plaintiff may be entitled to various remedies. That is, certain relief is available if a showing is made that the plaintiff is entitled to "a prompt and appropriate remedy." *See generally* 411 U.S. at 802-806.

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3. Petitioner does not dispute that ADEA and Title VII are reasonably similar in nature and approach, at least for purposes of this discussion.

This standard was modified somewhat by *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993). *Hicks*, which also involved a Title VII action, remarked upon the proof standards established in *McDonnell Douglas*.

Hicks noted that an employee plaintiff's establishing a prima facie case in effect creates a "presumption" that the employer unlawfully discriminated against the employee. 113 S. Ct. at 2747. The employer then is called upon to "rebut" the "presumption" by setting forth, by introduction of admissible evidence, reasons for its action which — if believed by the trier of fact — would support a finding that unlawful discrimination was *not* the basis for the employment action. *Hicks* emphasized that notwithstanding this duty by the employer to "rebut" the "presumption" of a prima facie case (if such a case is made), the "ultimate burden of persuasion" remains with the plaintiff.

Once the employer presents evidence for its contention that a non-discriminatory reason was involved in the employment action, that issue "drops from the case." *Hicks*, 113 S. Ct. at 2747. A plaintiff rebutting that "presumption" may not be entitled to judgment as a matter of law, since the evidence is still subject to findings as to sufficiency and credibility. However, *Hicks* did say (initial emphasis retained, final emphasis supplied):

> At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production — *i.e.*, has failed to introduce evidence which, *taken as true*, would *permit* the conclusion that there was a

> nondiscriminatory reason for the adverse action. *In that event, the court must award judgment to the plaintiff as a matter of law* . . . .

The Court further stated — in direct contravention of the standard enunciated by the District Court in granting Respondent's summary judgment motion[4] — "what is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands." 113 S. Ct. at 2751. The majority then engages in an extensive discussion aimed at refuting the contentions of the dissent that the majority has materially altered the nature of the proof required in discrimination actions. (*See* 113 S. Ct. at 2751-2756). The Court stated:

> Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason (in the context of the present case) race. That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. *That remains a question for the factfinder to answer* . . . .

113 S. Ct. at 2756 (emphasis supplied) .

Thus, as *Hicks* indicates, judgment *for the plaintiff as a matter of law* may result in a discrimination claim if the plaintiff

4. Although Petitioner recognizes that the District Court's ruling on summary judgment occurred prior to the *Hicks* decision.

has presented a prima facie case and the defendant has failed to meet the burden of production as to showing a nondiscriminatory reason for the employment action. In any event, the issue is one of fact for a determination by the trier of fact.

Also as to demonstrating relief under the ADEA, the Sixth Circuit stated some years ago in *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975), that a plaintiff *need not show that age was the sole reason for discharge*. Reviewing jury instructions in this regard, the *Laugesen* court stated at 510 F.2d at 317:

> . . . there could be more than one factor in the decision to discharge (the plaintiff) and that he was nevertheless entitled to recover if one such factor was his age and if in fact it made a difference in determining whether he was to be retained or discharged. This is so even though the need to reduce the employee force generally was also a strong, and perhaps even more compelling reason.

And *see also, Hawley v. Dresser Industries, Inc.*, 958 F.2d 720 (6th Cir. 1986). The *Hawley* court found the evidence sustained the jury's conclusion that a 62 year-old executive's age, rather than his performance, was the "predominant factor" in his termination as part of a reduction in force (he had been with the company for 37 years). Thus, granting a judgment n.o.v. for the defendant employer was improper.

In a reduction in force situation, a plaintiff seeking to recover under the ADEA must "either show that age was a factor in eliminating his position, or, where some employees are shifted to other positions, that he was qualified for another position, he was not given a new position, and that the decision not to place him in a new position was *motivated by* plaintiff's age." 958 F.2d at 723.

The extent to which age was a factor in the discharge decision was "a question of fact for a jury to decide." 958 F.2d at 724.

Further, as has been stated generally, meeting this burden of proof can include proof or evidence of discrimination by the employer on the basis of age itself, statistical evidence, or other circumstantial evidence. *Sanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2nd Cir. 1981). For example, in *Metz v. Transit Mix, Inc.*, *supra*, 828 F.2d 1202, the court concluded that an employer's desire to save the salary being paid to a 54 year-old employee by replacing the employee with a 27 year-old earning a lower salary was not sufficient justification to prevent relief under the ADEA.

Thus, the Sixth Circuit's improper affirmance of summary judgment here is further demonstrated by other decisions regarding pertinent ADEA considerations. In *Berndt v. Kaiser Aluminum & Chemical Sales Inc.*, 789 F.2d 253 (3rd Cir. 1986), the Third Circuit observed that the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination in a reduction in force matter is met when plaintiff shows he is a member of a protected class and he was laid off from a job for which he was qualified while others not in his protected class *(i.e.,* not as old) were treated more favorably, The court also emphasized that whether age was a determinate factor in the employer's decision to terminate a 58 year-old salesman was a question for the jury.

The court found the evidence sustained the plaintiff's contentions. Accordingly, it conclude the District Court acted properly in denying the defendant's new trial motion.

Similarly, *Siegel v. Alpha Wire Corporation*, 894 F.2d 50 (3rd Cir. 1990), reversed summary judgment entered for the defendant employer. The employee was 63 and a senior buyer for

the employer. She showed she was qualified for her job, had satisfactory performance ratings, but was dismissed and replaced by significantly younger individuals. Her former supervisor acknowledged that plaintiff was of "better than average" age.

The *Siegel* court stated that even though the company president testified that there was no discriminatory basis in the discharge of plaintiff, the plaintiff's prima facie case was established. Thus, summary judgment for the employer was not appropriate.

And *see, e.g., Taggart v. Time, Inc.*, 924 F.2d 43 (2nd Cir. 1991) (action by 59 year-old publications worker discharged during reduction in force, replaced by younger and less qualified worker, summary judgment for defendant improper); *Dryer v. Arco Chemical Co.*, 801 F.2d 651 (3rd Cir. 1986) (clerical workers over 55 compelled to take voluntary retirement, replaced by workers under 40, employer contended replacement workers were better qualified, court said determining whether this was pretext was for the jury); *Wilson v. Sealtest Foods Division of Kraftco Corp.*, 501 F.2d 84 (5th Cir. 1974) (62 year-old production clerk asked to take early retirement, replaced by 50 year-old, directed verdict for employer must be reversed in that plaintiff's case met burden of proof); *Nova v. Coca-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978) (former sales managers established prima facie case), and *Alphin v. Sears, Roebuck & Company*, 940 F.2d 1497 (11th Cir. 1991) (remarks by supervisors that 50 year-old store manager was "too old" and other circumstances showed prima facie case of age discrimination, plaintiff had a history of favorable job evaluations, several co-workers had commented positively on his performance).

In this regard, Navistar admitted to the following:

Mr. Lutz, 54 years old at the time of his discharge, is a member of a protected class (that is, the class of persons to whom the ADEA is directed);

Mr. Lutz was in a managerial position at the time of his termination;

Mr. Lutz was terminated (that is, he did not resign;

Mr. Lutz was not asked to take a pay cut to remain on the job;

Mr. Lutz was *qualified* to perform his job;

Mr. Lutz received satisfactory-or-better performance ratings during his employment;

Mr. Lutz received merit and other salary increases during his more than 29 loyal years at Navistar;

Age was a factor in the discharge decision; and

After termination Mr. Lutz was replaced (whether "temporarily" or not) with a younger employee.

Mr. Lutz went much further than a few vague statements or expressions of "belief" concerning his discharge. (*Compare, e.g., Sahadi v. Reynolds Chemical*, 636 F.2d 1116 (6th Cir. 1980)). Indeed, Navistar itself went further than this in its own admissions as to age being a factor in the discharge. Mr. Lutz did come forward with "direct and circumstantial" evidence to establish his prima facie case and to "rebut" the economic reasons cited by his employer for his termination. Mr. Lutz submitted sufficient evidence and brought it to the attention of the court in demonstrating his age discrimination claim.

The Sixth Circuit, in its brief Opinion affirming the District Court (*see* App. 1a-2a) cited *EEOC v. University of Detroit*, 904 F.2d 331 (6th Cir. 1990) and *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382 (6th Cir. 1993) at 1288-89. *University of Detroit* is a Title VII case involving whether an assistant professor could be discharged because he refused to join a teachers' union due to his religious objection to the union's pro-abortion activities. *Barnhart* involved an attorney terminated from a law firm — ostensibly due to declining work performance related to alcohol abuse — who did not cooperate with the firm in rehabilitation efforts. He brought an ADEA action against the firm.

In both cited cases, summary judgment was granted to the defendant employers. Both cases discussed the standards for ADEA recovery and summary judgment standards. *But* neither case provides sufficient basis for affirming the summary judgment here.

Plaintiffs often have a "difficult task" in meeting their burden of persuasion in ADEA cases. But a plaintiff need only show that age was "a" and not "the" determining factor in the employer's personnel decision. This typically involves reliance on circumstantial evidence. *See Chappell v. GTE Products Corp.*, 803 F.2d 261 (6th Cir. 1986) at 287 (and cases cited) and *Ackerman v. Diamond Shamrock*, 670 F.2d 66 (6th Cir. 1982).

While the District Court and the Sixth Circuit apparently felt the sole evidence here was Mr. Lutz's own "conclusions" or "belief" that he was discharged due to his age, significant additional evidence was present, including Navistar's own admissions. Certainly this was sufficient to raise a material issue of fact.

II.

SUMMARY JUDGMENT WAS IMPROPER, ESPECIALLY BASED ON EMPLOYER'S SUPPLEMENTAL AFFIDAVIT.

Given that the evidence, under this Court's standards, at least showed a prima facie case for ADEA recovery and called into question the employer's supposed non-discriminatory reason for Mr. Lutz's discharge, Petitioner further requests this Court to emphasize the limited efficacy of summary judgment in these situations. And here, summary judgment should not have been granted to Respondent Navistar, especially on its "supplemental" affidavit.

As this Court stated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), summary judgment should be granted, after an adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322. And *see Matshushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

However, *summary judgment also must be properly presented.* As was stated, for example, in *Crawford v. ITT Consumer Financial Corp.*, 653 F. Supp. 1184 (D.C.S.D. Ohio 1986), noting the general principles applying to summary judgment (citations omitted):

> In considering a motion for summary judgment the narrow question we must decide is whether there is no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law.

> [T]he court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. The moving party has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all the inferences to be drawn therefrom must be read and in the light most favorable to the party opposing the motion and, while the movant's papers are to be closely scrutinized those of the opponent are to be viewed indulgently.

Even if it is to be expected that younger employees moving up the employment ladder would replace discharged older employees, this fact does not preclude a prima facie showing by an ADEA plaintiff. Certainly it does not entitle the employer to summary judgment. And, generally, for a case to be properly submitted to a jury, there must be only more than a scintilla of evidence supporting the claim. *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943).

As Respondent has indicated, a wide range of other decisions conclude that in these circumstances, it is for the trier of fact to determine to what extent age played a role in the discharge decision. Here an issue of fact was created which the employer should not have been permitted to circumvent by its submission of the "supplemental" affidavit by Mr. Hennigan.

As noted in *Dilberti v. United States*, 817 F.2d 1259 (7th Cir. 1987), "It is well established that a party cannot create a genuine issue of fact by submitting an affidavit containing conclusory allegations which contradict plain admissions in prior deposition or otherwise sworn testimony." Citing *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 577-578 (2nd Cir.

1969) and *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 861-862 (7th Cir. 1985).

And in *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361 (8th Cir. 1983), the court, reviewing alleged wrongful termination of a dealership contract, and characterizing summary judgment as a "drastic" remedy, noted at 1365 (emphasis supplied):

> We emphasize that the strong remedy of summary judgment is to be reserved for those cases in which there is no genuine material issue of fact for determination. It is a procedure that is of great value in eliminating the sham and frivolous case. If testimony under oath, however, can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment. *A party should not be allowed to create issues of credibility by contradicting his own earlier testimony.* The district courts should examine such issues with extreme care. . . .

This Court thus should re-emphasize the limited value of summary judgment in these cases and must caution District Courts against granting (and Circuit Courts against affirming) summary judgment based on a "supplemental" affidavit in which a witness or a party seeks to "clarify" previous testimony on a material issue of fact and thereby attempt to remove that issue from consideration. (To the same effect *see Martin v. Dow Pharmaceuticals*, 851 F.2d 703 (3rd Cir. 1988) ("bootstrap" affidavit might not be sufficient to create material dispute of fact).

Here, Mr. Hennigan was not confused when he testified in his earlier deposition that age was a factor in the discharge of Mr. Lutz. The statement was not "ambiguous." The "supplemental" affidavit should not have been relied upon by the District Court.

Mr. Lutz had shown certainly more than a "remote possibility" that he could substantiate his claim. He had challenged Navistar's supposed non-discriminatory reason for his discharge, sufficient to withstand summary judgment. Entry of summary judgment was improper. This Court's own standards were bypassed in doing so.

III.

CONFLICT AMONG THE CIRCUITS AS TO ADEA

Finally, Petitioner states (*see* Supreme Court Rule 10.1(a)) that this Court should review and resolve the division among the Circuits regarding the extent to which age is a factor in an employment action for purposes of establishing a prima facie case under the ADEA, and whether a showing as to general discrimination standards is sufficient to create an inference of discrimination. It would appear that whether one has a prima facie case of age discrimination depends to some degree upon the Circuit in which the action is brought.

That is, several Circuits have found that meeting the four factors for a showing of discrimination will support an inference of discrimination or at least be sufficient for a prima facie case. *See* Annotation, 58 A.L.R. Fed. 94, "Proving that Discharge Was Because of Age, For Purposes of Age Discrimination in Employment Act" at § 3, noting cases in Second, Third, Fourth, Eighth, and Tenth Circuits. However, in other Circuits, especially in the Fifth Circuit, it is unclear whether a prima facie case would be established by satisfying these factors. (*See* § 6 and cases cited).

It is not appropriate, in the context of this Petition, for Petitioner to cite and discuss all of the cases decided by Circuit Courts of Appeals and extensively review the details of the conflict which appears among these Circuits as to the ADEA. Nevertheless, this Court may wish to review the range of approaches taken in the Circuits on the ADEA, especially as to establishing a prima facie case and the extent to which the age factor is involved. Further clarification and review by this Court of these standards and of the ADEA specifically (since the most oft-cited decisions by this Court in this area have been under Title VII), would be of great value as employment discrimination litigation proceeds.

CONCLUSION

THEREFORE, Petitioner Howland C. Lutz requests of this Court that it grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

KENNETH C. RUSH
Counsel of Record
LAGOS, LAGOS & RUSH
Attorneys for Petitioner
One South Limestone Street
Suite 1000
Springfield, Ohio 45502
(513) 323-5555

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED DECEMBER 12, 1994

NOT FOR PUBLICATION

NO. 93-4205

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HOWARD C. LUTZ,

Plaintiff-Appellee,

v.

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: LIVELY and SUHRHEINRICH, Circuit Judges, and DUGGAN, District Judge.*

PER CURIAM. On November 2, 1988 Lutz filed suit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 et seq., in the United States District Court. The district court granted defendant's motion for summary judgment, finding that

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* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

Lutz was terminated due to economic reasons — a general reduction in force. The sole issue on appeal is whether the district court erred in granting summary judgment in favor of defendant in this age discrimination act. We have conducted a de novo review of the district court's opinion granting defendant's motion for summary judgment, and find no error in the district court's reasoning. *EEOC v. University of Detroit,* 904 F.2d 331 (6th Cir. 1990); *see also Barnhart v. Pickrel, Schaeffer & Ebeling Co.,* 12 F.3d 1328, 1388-89 (6th Cir. 1993). Therefore, we AFFIRM the judgment of the district court for the reasons articulated by the district court in its December 31, 1992 opinion.

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION FILED SEPTEMBER 30, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-88-513

JUDGE WALTER HERBERT RICE

HOWLAND C. LUTZ,

Plaintiffs,

vs.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Defendant.

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION TO VACATE, TO REOPEN, TO REARGUE, TO RECONSIDER AND TO ALTER AND AMEND ITS JUDGMENT OF DECEMBER 31, 1992 (DOC. #42)

On December 31, 1992, this Court entered its Decision (Doc. #40), sustaining Defendant's motion for summary judgment in this age discrimination case. This case is now before the Court on Plaintiff's motion to vacate, etc. (Doc. #42).[1] In his motion, Plaintiff argues that, in sustaining the Defendant's motion for summary judgment, the Court improperly considered the

1. Plaintiff's motion is a timely motion to alter or to amend under Rule 59(e).

supplemental affidavit of Thomas Hennigan ("Hennigan"), an employee of the Defendant. Plaintiff argues that, in his supplemental affidavit, Hennigan contradicted his prior, sworn deposition testimony; therefore, that affidavit should have been disregarded. This Court does not agree. As the Court explained in its Decision (Doc. #40) of December 31, 1992, Hennigan's supplemental affidavit does not contradict his deposition testimony; rather, it explains or amplifies upon the answers he gave during his deposition. Although a person cannot contradict his or her prior deposition, it is permissible for a witness to supply an affidavit which clarifies such testimony. *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703 (3rd Cir. 1988); *Lane v. Celotex Corp.*, 782 F.2d 1526 (11th Cir. 1986); *Mays v. Hunter*, 717 F.Supp. 1247 (S.D.Ohio 1989).

Based upon the foregoing and for the reasons set forth in the Decision of December 31, 1992, the Court overrules Plaintiff's motion to vacate, etc. (Doc. #42).

September 30, 1993

s/ Walsh Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies to:

Kenneth G. Rush, Esq.
Anne C. Griffin, Esq.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION AT DAYTON

Case Number: C-3-88-513

HOWLAND C LUTZ

v.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiffs Motion to Vacate, to reopen, to reargue, to reconsider and to alter and amend its judgment of December 31, 1993 is overruled.

September 30, 1993
Date

Kenneth J. Murphy
Clerk

s/ Gerald M. Burke
(By) Deputy Clerk

APPENDIX C — DECISION OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION FILED DECEMBER 31, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case Number: C-3-88-513

HOWLAND C. LUTZ

v.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.

JUDGMENT IN A CIVIL CASE

XXX Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment will be entered in favor of the Defendant and against the Plaintiff herein; and that the captioned case is hereby terminated.

December 31, 1992
Date

Kenneth J. Murphy
Clerk

s/ T. Wonderly
(By) Deputy Clerk

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-88-513

HOWLAND C. LUTZ

Plaintiff

vs.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.

Defendant

DECISION AND ENTRY SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (DOC. #20); JUDGMENT TO BE ENTERED IN FAVOR OF THE DEFENDANT AND AGAINST PLAINTIFF; TERMINATION ENTRY

The Defendant's Motion for Summary Judgment (Doc. #20) is sustained, based upon the following considerations.

The Plaintiff's sole evidence in support of his claim of age discrimination is:

(1) His conclusion that age must have been the reason for his separation, given the fact that he was taken off the job which he was performing satisfactorily and replaced by another person who was younger and, he assumes, making less money;

(2) Years of more than adequate performance on the job, as reflected in good to outstanding evaluations, as well as a merit raise, mere months before his termination; and

(3) An ambiguous statement contained in the deposition of the Defendant's Director of Human Resources, later explained (not contradicted) in an affidavit, in which he stated that he directed those managers responsible for making the reduction in force decisions to give consideration to "EEO, age, company service, performance, flexibility, education, training, background [and] experience."

Such evidence, in a claimed age discrimination case, defended upon the ground of an economic-based reduction in force, would not be enough to withstand a motion for judgment as a matter of law (formerly motion for directed verdict) at the conclusion of the Plaintiff's case in chief, and is not sufficient to withstand a pretrial motion for summary judgment. In this case, the Defendant has introduced, *inter alia,* the following in response to Plaintiff's claim:

(1) "Because of lower than expected net income, reduced shipments of product, a decline in the price realization for both new and used trucks during 1986 and a forecast of a declining market for Navistar's products in 1987, it was determined that cost reductions were necessary for the economic success of Navistar; these cost reductions included the separation of seventy-two of the four hundred and eighty-two managerial employees at the Springfield plants." Affidavit of Thomas Hennigan, Exhibit A to Defendant's Motion for Summary Judgment (Doc. #20).

(2) "Navistar's reduction in force did not adversely impact

upon managers in the protected age class; the percentage of managers in the protected age class actually increased because of the reduction in force; before the reduction in force 75.7 percent of Navistar managers were above forty; whereas after the separation, 76.1 percent were in above age forty." Id. at Paragraph 14.

(3) "2. On February 12, 1990, my deposition was taken by Kenneth Rush, counsel for the Plaintiff Mr. Lutz. In that deposition, Mr. Rush asked me the factors which were involved in the plan for separation of management employees in October of 1986, which reduction in force resulted in the termination of Mr. Lutz. I responded that managers who were making the decisions were counseled to 'give consideration to EEO, age, company service, performance, flexibility, education, training, background, experience.' My reference to 'EEO' and 'age' as factors which managers should consider was made solely with the intent of instructing managers that the separations must be conducted in strict accordance with the Equal Employment Opportunity and Age Discrimination Laws. My intent was to state that managers were informed that no group of employees by race, sex, age, or any other protected category, should be treated or affected in a disparate manner as a result of the separations.

3. Mr. Rush asked me nothing further concerning my response to his question, and I truly believed at that time that those attending the deposition understood the meaning of my response." Supplemental Affidavit of Thomas Hennigan, Paragraphs 2 and 3, attached to Defendant's Reply Memorandum in Support of Motion for Summary Judgment (Doc. #29).

In response to a properly documented motion for summary judgment, Plaintiff, as the non-moving party given the benefit of

every *reasonable* inference to be drawn from the facts submitted, has the burden of demonstrating the existence of a genuine issue of material fact. The Plaintiff has failed to sustain this burden. Assuming, *arguendo*, that a *prima facie* case has been demonstrated, the law is replete with citations that a *prima facie* case is not sufficient to sustain a claim of age discrimination, when that claim is countered with the defense of an economic-based reduction in force.

> Generally an ADEA plaintiff who has been terminated amidst a corporate reorganization carries a greater burden of supporting charges of discrimination than an employee who is not terminated for similar reasons. To meet his ultimate burden of demonstrating that he was a victim of age discrimination, the Plaintiff, in addition to proving that he fell within the protected class, that he was terminated and that he was replaced by a younger individual, must come forward with additional direct, circumstantial, or statistical evidence that age was a determining factor in his termination. *Kast v. Fulton Industries, Inc.*, 842 F.2d 331 (6th Cir. 1988), citing *LaGrant v. Gulf and Western Manufacturing Company, Inc.*, 748 F.2d 1087 (6th Cir. 1984).

Plaintiff has failed to present the required "additional direct, circumstantial or statistical evidence that age was a determining factor in his termination." The statistical evidence, quoted above, belies his contention of age discrimination. The Plaintiff's conclusory allegations, based upon his subjective belief, that he was discharged because of his age, are not sufficient to establish a

prima facie case of age discrimination. *LaGrant, supra.* Again, assuming the existence of a *prima facie* case, the Defendant-Employer has articulated a legitimate, non-discriminatory reason for the Plaintiff's termination, to wit: an economic-generated reduction in force. Once the Defendant has articulated a legitimate non-discriminatory reason for the adverse employment decision, it then becomes the Plaintiff's burden to demonstrate that such legitimate, non-discriminatory reason was a mere pretext for a prohibited action. In this case, the only evidence, direct or circumstantial, that could conceivably demonstrate pretext (or, if the *prima facie* case analysis is not used, could demonstrate the "additional direct, circumstantial or statistical evidence that age was a determining factor in his termination), other than his conclusion that age was the only logical explanation for his termination, other than years of satisfactory evaluations and a recent merit pay increase, is the above-quoted language from Hennigan's deposition. As indicated, that somewhat ambiguous statement was clarified (not contradicted) by Hennigan in his Supplemental Affidavit. In the Sixth Circuit, while one cannot contradict an earlier given deposition by a subsequent affidavit, there is no prohibition against a subsequent affidavit explaining or amplifying an answer previously given in a deposition.

As a non-moving party, opposing a properly documented motion for summary judgment, the Plaintiff is entitled to every reasonable inference to be drawn from the evidence submitted. The Court, in determining whether a genuine issue of material fact exists, must determine whether any rational/reasonable trier of fact could determine the issue in any manner other than that advocated by the moving party. To put the matter in the obverse, the Court must determine whether any rational/reasonable trier of fact could determine the issue of fact in a manner favorable to the

Plaintiff. In this case, this Court concludes that it is neither a reasonable inference nor a remote possibility that any reasonable/rational trier of fact could conclude that Hennigan's deposition meant, as Plaintiff would have this Court believe, that he directed his managers, in deciding the issue of who would be terminated due to the reduction in force, to make certain that age was a determining factor. Such a conclusion would be both unreasonable and irrational, to the extent that same could not sustain a jury verdict. It would be a particularly unreasonable and irrational conclusion to interpret Hennigan's deposition statement, in the manner Plaintiff requests, when, in the very same sentence, Hennigan has stated that he directed his managers to also take into consideration, not only factors such as would be relevant to a reduction in force, factors pertaining to the relative abilities of the employees involved, but also EEO considerations. Interpreting this sentence, as Plaintiff would have this Court do, would have Hennigan telling his managers to be very cognizant of EEO considerations, but to fire the old people anyway. Such an interpretation would be not only unreasonable and irrational, but ridiculous as well. Accordingly, this Court concludes that there is no genuine issue of material fact presented on the issue of whether age was a determining factor in the Plaintiff's termination.

WHEREFORE, based upon the aforesaid, this Court sustains the Defendant's Motion for Summary Judgment (Doc. #20) in its entirety. Judgment will be entered in favor of the Defendant and against the Plaintiff herein.[1]

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1. The distinction between this case and the case of *Adrian Auckerman*, a similarly situated "managerial" employee (albeit in a different department) who was likewise terminated on account of an alleged reduction in force, is that in the *Auckerman* litigation, there was evidence that, within months of his termination, the

(Cont'd)

Appendix C

The captioned cause is ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

s/ Walter Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies mailed to:

Kenneth Rush, Esq.
Anne C. Griffin, Esq.

(Cont'd)
Defendant began hiring a greater number of managers than it had terminated in October, 1986, that these replacement managers were distinctly younger than Plaintiff and that, with regard to the October, 1986, terminations, a disproportionate number of those terminated were, like him, above the age of fifty. This information constitutes the type of "additional direct, circumstantial or statistical evidence tending to indicate that the employer singled out the Plaintiff for discharge for impermissible reasons" referred to in the Sixth Circuit's opinion in *LaGrant v. Gulf and Western Manufacturing Company*, 748 F.2d 1087 (6th Cir. 1984).

APPENDIX D — COMPLAINT AND JURY DEMAND FILED OCTOBER 12, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OHIO

Civil Action No. C-3-88-513

WALTER H. RICE

Howland C. Lutz
305 Broadmoor BLvd. N.
Springfield, Ohio 45504

Plaintiff

vs.

Navistar International Corp.
2069 Lagonda Avenue
Springfield, Ohio 45501

Defendant

COMPLAINT AND JURY DEMAND

The Plaintiff alleges:

1. This action is brought pursuant to the Age Discrimination in Employment Act of 1967, as amended, 29 USC Sec. 621 et seq., 29 USC Sec. 215 et seq., and 28 USC Sec. 1343(4). The jurisdiction of this Court is invoked to secure protection of and redress deprivation of rights guaranteed by federal law which provides for injunctive and other relief against age discrimination in employment practices.

Appendix D

2. The Plaintiff, Howland C. Lutz, is a citizen of the United States and resides in Clark County of Ohio. He is 54 years old and was the Supervisor for Navistar International Corp. since approximately July 1, 1957. At all times the Plaintiff's general performance has been, at least, satisfactory. On Oct. 13, 1986 without prior written notice, he was discharged by the Defendant. He was immediately replaced by a younger, less qualified employee, whose salary/wages were less than that of Plaintiff.

3. The Defendant is an employer in Clark County, State of Ohio and in Springfield, County of Clark and State of Ohio, engages in an industry affecting commerce, and employs more than 20 employees.

4. The Plaintiff filed timely charges of age discrimination and retaliation with the Equal Employment Opportunity Commission and the State Civil Rights Commission and has met all administrative prerequisites for bringing this action.

5. The Defendant engaged in policies and practices which willfully, or in the alternative unwillfully, discriminated against the Plaintiff on the basis of his age, including but not limited to the following acts:

a. Discharging Plaintiff on October 13, 1986.

b. Replacing Plaintiff with a younger employee doing the same work.

c. Replacing Plaintiff with an employee at a lower rate of pay/wages.

d. Discharging Plaintiff on October 13, 1986 upon pretextural grounds of economic necessity.

6. All of the above acts of the Defendant violate 29 USC Sec. 621 et seq. The Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs alleged herein, and this action for permanent injunction and other relief is his only means of securing adequate relief, The Plaintiff is suffering and continues to suffer irreparable injury from the Defendant's acts.

Wherefore, the Plaintiff respectfully prays the Court to advance this case on the docket, order a hearing at the earliest practicable date, and upon such hearing to:

A. Grant the Plaintiff a permanent injunction enjoining the Defendant, its agents, successors, employees, and those acting in concert with the Defendant from continuing to violate the rights of the Plaintiff;

B. Grant the Plaintiff an order requiring the Defendant to reinstate the Plaintiff to his former job positions or to a position similar in responsibilities and pay, and to make the Plaintiff whole, by appropriate back-pay awards, prejudgment interest, fringe benefits, and otherwise, for the violations described above; or, if the Defendant cannot reinstate the Plaintiff, enter an order requiring the Defendant to pay-front pay, fringe benefits and other compensation to the Plaintiff until he attains the age of 62.

C. Award the Plaintiff the costs of this action, including reasonable attorney's fees and liquidated damages, and such other and further relief that this Court may deem just, proper, and equitable.

Respectfully submitted,

KENNETH G. RUSH CO. LPA

Appendix D

By s/ Kenneth G. Rush
Kenneth G. Rush
705 BancOhio Building
Springfield, Ohio 45502
Attorney for Plaintiff
513-323-1007

JURY DEMAND

Plaintiff demands a Jury to try all claims tryable by a jury.

Respectfully submitted,

KENNETH G. RUSH CO. LPA

By s/ Kenneth G. Rush
Kenneth G. Rush
Attorney for Plaintiff

APPENDIX E — NOTICE OF APPEAL FILED OCTOBER 28, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. C-3-88-513

HOWLAND C. LUTZ

Plaintiff

- vs -

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.

Defendant

NOTICE OF APPEAL

Notice is hereby given that HOWLAND C. LUTZ, Plaintiff, hereby appeals to the United States Court of Appeals for the Sixth District from the Judgment sustaining Defendant's Motion for Summary Judgment; Judgment Entry in favor of Defendant against Plaintiff entered in this action on the 31st day of December, 1992 and Judgment Entry overruling timely motion 59 (E) FRCP by Plaintiff entered September 27, 1993.

s/ Kenneth G. Rush
KENNETH G. RUSH #0011687
LAGOS, LAGOS & RUSH
1 South Limestone Street
Springfield, Ohio 45502
(513) 323-5555
Attorney for Plaintiff

Appendix E

CERTIFICATION

I hereby certify a copy hereof was mailed by regular mail to Anne C. Griffin, Esquire, Vorys Sater, Seymour & Pease, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43215 on the 21st day of October, 1993.

s/ Kenneth G. Rush
KENNETH G. RUSH #0011687
LAGOS, LAGOS & RUSH
Attorney for Plaintiff

APPENDIX F — AMENDED NOTICE OF APPEAL FILED NOVEMBER 1, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. C-3-88-513

HOWLAND C. LUTZ

Plaintiff

- vs -

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.

Defendant

AMENDED NOTICE OF APPEAL

Notice is hereby given that HOWLAND C. LUTZ, Plaintiff, hereby appeals to the United States Court of Appeals for the Sixth District from the Judgment sustaining Defendant's Motion for Summary Judgment; Judgment Entry in favor of Defendant against Plaintiff entered in this action on the 31st day of December, 1992 and Judgment Entry overruling timely motion 59 (E) FRCP by Plaintiff entered September 30, 1993.

s/ Kenneth G. Rush
KENNETH G. RUSH #0011687
LAGOS, LAGOS & RUSH
1 South Limestone Street
Springfield, Ohio 45502
(513) 323-5555
Attorney for Plaintiff

Appendix F

MEMORANDA

This amended notice of appeal is filed to correct a typographical error in the notice of appeal filed herein on October 28, 1993.

The last line of the original notice of appeal incorrectly stated that the entry overruling the timely motion filed under rule 59 (e) was entered on September 27, 1993. The correct date, as can be seen from the record is September 30, 1993.

Respectfully submitted

s/ Kenneth G. Rush
Kenneth G. Rush

CERTIFICATION

I hereby certify a copy hereof was mailed by regular mail to Anne C. Griffin, Esquire, Vorys Sater, Seymour & Pease, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43215 on the 1st day of November, 1993.

s/ Kenneth G. Rush
KENNETH G. RUSH #0011687
LAGOS, LAGOS & RUSH
Attorney for Plaintiff

FILED
APR 12 1995
OFFICE OF THE CLERK

NO. 94-1508

SUPREME COURT OF THE UNITED STATES
October Term, 1994

HOWLAND C. LUTZ,

Petitioner,

vs.

NAVISTAR INTERNATIONAL
TRANSPORTATION CORP.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NAVISTAR INTERNATIONAL TRANSPORTATION CORP.

Anne C. Griffin
VORYS, SATER, SEYMOUR
AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400

Counsel of Record for
Respondent Navistar
International Transportation Corp.

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STATEMENT OF CORPORATE AFFILIATIONS

Navistar International Corporation is the parent corporation of Respondent Navistar International Transportation Corp. Respondent has no subsidiaries that are not wholly-owned.

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STATEMENT OF THE CASE

It is difficult to conceive of a case that is less deserving of Supreme Court review than the instant appeal. Petitioner claims that it raises an important legal issue concerning the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §621, et seq. But the issue purported by Petitioner -- whether summary judgment may properly be entered in favor of an employer in an ADEA action where (a) the discharged employee was replaced by a younger worker, (b) there was an increase rather than a decrease in the workforce, and (c) the employer admits that age was a determining factor in the discharge -- is not even in dispute in this case. Instead, Petitioner attacks the factual conclusions of the District Court that he was not "replaced" by a younger worker, that he was discharged in an economically-motivated reduction of the workforce, and that his employer never stated that age was a determining factor in his discharge. None of these factual matters warrants review by the United States Supreme Court.

The action. Petitioner Howland C. Lutz was employed by Respondent Navistar International Transportation Corp. in several managerial positions at Navistar plants in Springfield, Ohio. In October 1986, Navistar faced lower than expected net income, reduced shipments of its products, and a gloomy forecast of declining markets in the future. Navistar was forced to significantly reduce its operating costs, including, inter alia, reducing the workforce at its Springfield plants. Petitioner was one of 72 managers -- out of a total of 482 managerial employees -- who were released. Two years later, Petitioner filed this lawsuit in the United States District Court for the Southern District of Ohio, Western Division, alleging that his employment had been terminated by Navistar because of his age, in violation of the ADEA. (Complaint, Oct. 12, 1988.)

The proceedings below. After 2½ years of discovery proceedings in the trial court, Navistar moved for summary judgment on the grounds that Petitioner's discharge had been based solely on economic considerations, and that his

age had not been a determining factor. (Motion for Summary Judgment, Feb. 20, 1990.) The District Court granted the motion. (Decision and Entry, Dec. 31, 1992.) It reasoned that Petitioner's conclusory allegations of age discrimination, supported only by his own subjective beliefs, were insufficient to sustain his claims in the face of undisputed evidence that his discharge resulted from an economically-motivated reduction in the workforce, and that the workforce reduction had actually increased the percentage of older Navistar managers in the statutory protected age class. (Id., at 2, 4.) That decision was affirmed per curiam by the United States Court of Appeals for the Sixth Circuit. (Order, Dec. 12, 1994.)

The evidence. Petitioner presented evidence in the District Court that he was over the age of 40, and thus in the age class protected by the ADEA, at the time of his discharge; that he was reasonably qualified for his managerial employment position; and that he was discharged from that position by Navistar. He now claims that he also presented evidence of the fourth element of an ADEA prima facie case:

that he was replaced by a younger employee. (Petition, at 22.) There is no such evidence. It was undisputed below that the "replacement," Marshall D. Leigh -- a Navistar manager who was himself in the protected age class -- was briefly and temporarily transferred to Petitioner's former department to maintain production requirements for a six week period during the implementation of the reduction in the workforce, and that he was then transferred elsewhere, leaving that department with two fewer managers than it had before the reduction. Thus, Petitioner was not replaced by anyone, as a matter of undisputed fact.

In addition, Petitioner attempts to dispute Navistar's non-discriminatory explanation for his discharge -- a general reduction in workforce mandated by economic necessity -- by now claiming that there was actually an increase in the workforce; according to Petitioner, the number of managers in his former department increased by two in the following year, and increased further in a later year. (Petition, at 6.) But Petitioner bases his count upon a list of every supervisor who

worked in the department for any length of time during that period and not upon the number of managerial positions in that department. (Exhibit E, Navistar's Response to Plaintiff's First Request for Production of Documents.) It remains undisputed that a reduction in the workforce occurred, from 482 down to 410 managers generally, and that Petitioner's department functioned with two fewer managerial positions until, long after his discharge, a second shift was temporarily required on one production line to meet marketplace exigencies. In short, Petitioner was discharged as part of reduction in workforce, as a matter of undisputed fact.

Third, and finally, Petitioner insists that Navistar has "admitted" that age was an adverse determining factor in his discharge. (Petition, at 5, 22, 27.) Both the District Court and the Circuit Court found that Navistar made no such "admission." Instead, Navistar's Manager of Human Resources, Thomas Hennigan, testified at deposition that he instructed the individuals who made the discharge decisions "to give consideration to EEO, age, company service, performance,

flexibility, education, training, background, experience." (Dep. of T. Hennigan, Feb. 12, 1990, at 22.) Even though "age" thus appears in a list of factors that clearly favor the retention of older more experienced workers, Petitioner chose to interpret Mr. Hennigan's statement as favoring the retention of younger workers. Any perceived ambiguity in this respect ended when Navistar filed Mr. Hennigan's affidavit:

> In that deposition, Mr. Rush [counsel for Plaintiff] asked me the factors which were involved in the plan for separation of management employees in October 1986 .... My reference to "EEO" and "age" as factors which managers should consider was made solely with the intent of instructing managers that the separations must be conducted in strict accordance with the Equal Employment Opportunity and Age Discrimination Law .... Mr. Rush asked me nothing further concerning my response to his question, and I truly believed at that time that those attending the deposition understood the meaning of my response.

(Supp. Aff. of T. Hennigan, March 27, 1990, attached to Navistar's Reply Mem. in Support of Summary Judgment, at 1-2.)

More importantly, the Navistar employees who carried out the reduction in workforce clearly understood exactly what Mr. Hennigan was telling them -- the percentage of managers in the protected older age class actually increased as a result of the October 1986 workforce reduction (Aff. of T. Hennigan, Feb. 20, 1990, attached as Exhibit A to Navistar's Motion for Summary Judgment, at 4), i.e., there was, as a matter of undisputed fact, no discrimination against older workers in the workforce reduction.

The District Court concluded that Mr. Hennigan's reference to "age" was not an "admission" that age was an adverse determining factor in Petitioner's discharge:

> In this case, the only evidence, direct or circumstantial, that could conceivably demonstrate pretext ... is the above-quoted language from Hennigan's deposition. As indicated, that somewhat ambiguous statement was clarified (not contradicted) by Hennigan .... [I]t is neither a reasonable inference nor a remote possibility that any reasonable/rational trier of fact could conclude that Hennigan's deposition meant, as Plaintiff would have this Court believe, that he directed his managers ... to make certain that age was a determining [adverse] factor .... [I]n the very same

> sentence, Hennigan has stated that he directed his managers to also take into consideration ... EEO considerations. [Plaintiff's interpretation] would have Hennigan telling his managers to be very cognizant of EEO considerations but to fire the old people anyway. Such an interpretation would be not only unreasonable and irrational, but ridiculous as well.

(Decision and Entry, Dec. 31, 1992, at 5-6.)

In summary, the dispute between the parties involves the evidentiary existence of the three factual predicates to Petitioner's "issue of law," and not the "issue of law" itself. As set forth below, those factual matters were resolved properly by the District Court. This case does not raise any legal question arising under the ADEA and does not warrant review by the United States Supreme Court.

ARGUMENT

In the absence of any controlling question of law, the Supreme Court should decline to second-guess a District Court's determinations of factual matters.

Petitioner's request for a writ of certiorari should be denied. This litigation does not present any significant issues of law, policy, or fairness, and there is no conflict between any lower courts as to the factual matters decided by the District Court. The ruling below does not conflict with any decision of this Court and does not implicate any important issues of federal law which require review by the Court. Petitioner has utterly failed to suggest any reason to grant certiorari in this case.

Petitioner disingenuously claims that a writ should issue in this matter so that the Court can "review and resolve the division among the Circuits" regarding the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, et seq. This is apparently a reference to the somewhat different approaches employed by some federal courts in evaluating a

prima facie case pursuant to the four factors outlined in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Whatever academic interest that legal question might have for the Court, it is not an issue in this case. The District Court correctly concluded that the fourth factor of the McDonnell-Douglas standard -- the replacement of Petitioner by a younger worker -- did not occur here as a matter of fact. Any purported need to resolve the "conflict among the Circuits" on a different issue must await a case that factually raises the issue. This is not such a case.

If a plaintiff in an ADEA case only establishes the first three factors of McDonnell-Douglas -- that he is in the protected age class, that he was qualified for his employment position, and that he was discharged -- a court cannot logically or legally infer that age was a determining factor in the discharge. Indeed, the first three factors exist in any discharge that occurs during a non-discriminatory reduction in workforce. The fourth factor -- that plaintiff was replaced by a younger worker -- is critical because it is the only factor that even

suggests the existence of age discrimination, as required by the ADEA. See 29 U.S.C. §623(a) ("it shall be unlawful for an employer ... to discharge any individual ... because of such individual's age") (emphasis added).

In the present case, Petitioner's only "proof" of the critical fourth factor is the undisputed evidence that, after he was discharged, another manager was temporarily assigned to cover his former position for a six week period in order to solve temporary production problems; that person was transferred to a different position in a different department within a very short time, and Navistar then operated Petitioner's former department without anyone filling his former position. (Aff. of T. Hennigan, supra.) The District Court correctly concluded that Petitioner was not "replaced" by a younger worker. See, e.g., Barnes v. GenCorp, Inc., 896 F.2d 1457, 1465 (6th Cir. 1990) ("a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees").

Having failed to establish a prima facie case of age discrimination, Petitioner then further failed to demonstrate that Navistar's non-discriminatory explanation of his discharge -- a general reduction in workforce mandated by economic considerations -- was pretextual. First, there is nothing in the evidentiary record that supports his claim that the workforce actually increased, rather than decreased, at the time he was discharged. His present claim -- that the number of managers in his former department increased the following year -- is based upon a count of all persons who served in a managerial position for any part of the year, not upon a count of managerial positions. (See Exhibit C of Navistar's Response to Plaintiff's First Request for Production of Documents.) Petitioner's further argument that the number of managerial positions increased two years later, in 1988, does not logically show that there was no reduction of the workforce at the time he was discharged, in 1986; in any event, it is undisputed that this later increase was temporary, that it resulted from the short-term addition of a second shift to meet production exigencies, and

that the managers placed in those positions were not new hires but were in fact reassigned from existing positions. Once again, none of this remotely establishes that there was no workforce reduction when Petitioner was discharged, and thus cannot support any inference that the workforce reduction was pretextual.

More importantly, Petitioner cannot claim that the reduction in workforce was a pretextual device to disguise discrimination against older workers, because the undisputed evidence conclusively shows that the proportion of older managers actually increased as a result of the workforce reduction. After Petitioner and the other 71 managers were discharged, a higher percentage of managers fell within the statutory protected age class. (Aff. of T. Hennigan, supra.) In short, Petitioner cannot possibly establish that the workforce reduction was a pretextual ploy to reduce the number of older workers, when the reduction disproportionately impacted upon younger workers.

This statistical evidence of an increase in the percentage of older managers, as a result of the workforce reduction, also logically precludes Petitioner's final claim: that Navistar has admitted that age was an adverse determining factor in selecting which managers it would discharge. That claim cannot possibly be true, because it is undisputed that younger managers were in fact discharged at a proportionately higher rate than older managers, and age was thus a factor favoring retention rather than discharge.

In any event, Navistar never made the "admission" claimed by Petitioner. Its Manager of Human Resources, Thomas Hennigan, testified at deposition that "as far as guidance to the managers who were making the [discharge] decision, the individuals were counseled to give consideration to EEO, age, company service, performance, flexibility, education, training, background, experience." (Dep. of T. Hennigan, supra, at 22.) Where "age" is one factor in a list that begins with a reference to non-discrimination requirements, and concludes with a list of factors that favor older workers, it is

ridiculous for Petitioner to assume that "age" alone was an adverse factor. The statistical outcome of the application of these considerations demonstrates that fewer older workers were discharged, i.e., that "age" was not an adverse determining factor. The most that Petitioner can claim is that Hennigan never specified if the considerations he listed were adverse to or supportive of, retention, and that his statement is therefore ambiguous. Any perceived ambiguity was clarified in his affidavit: "My reference to 'EEO' and 'age' as factors which managers should consider was made solely with the intent of instructing managers that the separations must be conducted in strict accordance with the Equal Employment Opportunity and Age Discrimination Laws." (Supp. Aff. of T. Hennigan, supra.)

The District Court specifically held that Mr. Hennigan's affidavit "does not contradict his deposition testimony; it explains or amplifies upon the answers he gave ...." (Decision and Entry, Sept. 30, 1993, at 2.) Petitioner's present argument -- that the affidavit should not have been admitted because it contradicted the deposition testimony -- once again

fails to raise a legal issue deserving of review by this Court; instead, he disagrees with the factual determination of the District Court that there was no contradiction. It is beyond cavil that, in the absence of any contradiction, the affidavit was properly considered by the District Court. See, e.g., Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703 (3d Cir. 1988); Dilberti v. United States, 817 F.2d 1259 (7th Cir. 1987); Lane v. Celotex Corp., 782 F.2d 1526 (11th Cir. 1986).

In short, the "legal issue" identified in this case by Petitioner -- whether it is error to grant summary judgment to an employer in an ADEA case if (1) the employee was replaced by a younger worker, (2) there was no decrease in the workforce that explains his discharge, and (3) the employer admits that age was an adverse determining factor in the discharge -- is not even in dispute in this case. Instead, Petitioner complains that the District Court improperly concluded that the three factual predicates of his legal issue were not supported by the evidence. None of these factual issues warrants review by the United States Supreme Court.

See St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2751 (1993) ("[w]e have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated") (original emphasis).

CONCLUSION

Petitioner's request for a writ of certiorari should be denied. There is no dispute as to the legal principles governing this litigation, and there is no reason for the Supreme Court to second-guess the factual conclusions of the District Court and Circuit Court of Appeals. Petitioner's claim of age discrimination in the 1986 reduction of Respondent's workforce cannot possibly succeed in the face of the undisputed fact that the reduction disproportionately affected younger workers. Petitioner's speculative and subjective belief that he must have been the victim of age discrimination cannot prevail over the evidence of record that no such discrimination occurred. There is no conceivable reason for the Supreme Court to expend its

time and resources to revisit the factual conclusions of the courts below. The petition should be denied.

Respectfully submitted,

VORYS, SATER, SEYMOUR
AND PEASE

By _____
Anne C. Griffin

52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400

Counsel of Record for
Respondent Navistar
International Transportation Corp.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Brief in Opposition were served upon all other parties in this action:

Kenneth G. Rush
Lagos, Lagos & Rush
One South Limestone Street
Suite 1000
Springfield, Ohio 45502
Counsel for Petitioner
Howland C. Lutz

via regular U.S. Mail, postage prepaid, this 12th day of April, 1995.

Anne C. Griffin